IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

CIVIL MISC. APPEAL No. 1847 of 2007

KAILASH CHANDRA
V/S
ABHISHEK PRATAP SINGH

Mr. JP JOSHI, for the appellant / petitioner

Mr. MANISH SHISHODIA, for the respondent

Date of Order : 22nd August, 2007

HON'BLE SHRI N P GUPTA,J.

JUDGMENT

This appeal has been filed against the order of the learned trial court dt. 19.7.2007, granting temporary injunction, restraining the appellant from interfering with the peaceful use and enjoyment by the plaintiff of the suit shop, directing him not to cause any damage to the shop, directly or indirectly by seepage of water from the roof, not to forcibly dispossess the plaintiff, not to do any such act which may create difficulties to the plaintiff, or the customers, in carrying on business in the suit shop, or having ingress or egress into it, and mandatory injunction has been granted, directing the defendant appellant to stop the water seepage from the roof, and to repair the damaged pipes, the defendant has further been directed to remove his lock from the shutter, and to remove central lock, if

there be any. The learned trial court has also directed, that if the defendant does not remove the lock within seven days, the plaintiff will be entitled to have it broken opened, with the police assistance, and will be entitled to enter in the shop.

The facts necessary, are, that the respondent filed a suit for specific performance of the agreement to sell the suit shop, being shop no. 2 situated on the ground floor of Kirti Plaza Complex. It is alleged that the shop was agreed to be purchased at a price of Rs. 5 lacks for which agreement was executed, and the defendant has already received the amount, far above the agreed price, but is not executing the sale deed. In this suit the plaintiff filed an application under O. 39 Rule 1 and 2 also, reiterating the plaint averment, and pleading, that the defendant had delivered actual physical possession of the shop to the plaintiff, wherein the plaintiff is carrying on business of ready-made garments, in the name and style of "Abhishek Fasion Point", and that, the possession has been delivered while receiving the amount. According to the plaintiff he got erected the artificial roof of Plaster of Paris, and walls were got painted with costly plastic paint, and has got decorated the shop attractively for business, obtained sales tax registration, and has also produced the registration form, so also various orders given to various suppliers, and the purchase bills, so also the photographs

of the shop. It is alleged, that the defendant, by hook or crook, wants to dispossess the plaintiff, and in this process, on 10.4.2007 the pipe going on the roof of the shop was damaged, which resulted into seepage of water in shop, the electric supply was disconnected, and on one side of the railing, in the balcony, a brick wall was constructed, and on the other entrance, 3-4 musclemen were deputed, and the plaintiff has been threatened to vacate the premises within two days, as such he is not able to carry on the business. It is also pleaded, that towards the east, the wall constructed, is required to be removed by mandatory injunction, as the shop is not visible, and also prayed for injunction, restraining the defendants from interfering with the plaintiff's business, or to cause any damage to it, or to dispossess him etc.

The defendant contested the application denying to have received the balance sale price, and pleaded, that the plaintiff himself had torn away the agreement on 14.9.2004. Thus, the agreement was cancelled, and for two years thereafter the plaintiff was never ready and willing to perform his part of the contract, and kept silent, thus, concealing the real facts the application has been filed. Then, it was contended that there is no stipulation in the agreement to show, that possession was delivered to the plaintiff, otherwise this fact would have been mentioned in the plaint as well, apart from finding recital in the

agreement, and it is only after filing written statement, that the plaintiff has alleged to be in possession, with oblique motive, for seeking injunction. It is also contended, that from mere obtaining R.S.T. & C.S.T. Certificate, or producing bills, it cannot be concluded, that the plaintiff is in possession, and it was denied, that any Plaster of Paris work or painting was done, and that the defendant being owner of the property is entitled to use the property, according to his own free will, which cannot be restrained, and it was pleaded, that the plaintiff is a stranger and trespasser, and unregistered and unstamped document does not give any right to him, and he being trespasser, and stranger, has no prima facie case. It was contended, that even according to Section 52 of the Transfer of Property Act, the plaintiff cannot claim any injunction. It was then contended, that with a view to prevent entry of unauthorised strangers in the shop and hotel, wall was constructed four years ago, which cannot be ordered to be removed.

The learned trial court decided three elements, being prima facie case, balance of convenience, and irreparable loss, in favour of the plaintiff, and has granted injunction as above.

Assailing the impugned order it was contended, that in the written statement, the appellant had

categorically denied the averments of the plaint, about having ever received the balance sale price, and the learned trial court has proceeded with the assumption, that it is prima facie established, that after agreement, the possession was delivered to the plaintiff, after receiving the amounts mentioned in the agreement, thus the finding is an out come of conjecture, and is required to be set aside. Then, it was contended that admittedly in the agreement there is no recital about delivery of possession to the plaintiff, while if the possession was delivered, there was no earthly reason not to mention this in the agreement. Likewise, even in the plaint there is no averment about the plaintiff having been delivered possession; and the present injunction application has been filed after a long delay of one year, by projecting cooked up stories. It is also contended, that if the plaintiff's version had any trace of truth, the plaintiff could have very well produced the electricity consumption bills, for the electricity consumed by him in the shop. It was next contended, that in the application for temporary injunction no prayer has been made for opening central lock, notwithstanding that, the learned court below has gone far beyond the application, and has granted injunction, which is bad. Learned counsel submitted, that the application for appointment of commissioner was filed on 1.5.2007, and on 3.5.2007 commissioner has found the appellant's lock, and simply because the plaintiff had put additional lock on the

shutter, it cannot establish the plaintiff's possession. Then, it was contended that the findings have been arrived at by the learned trial court, by drawing inference from the order sheets, for which there is no basis. According to the learned counsel, there is no pleading on the part of the plaintiff, that the defendant had subsequently put the lock on the shop, rather it is only after the Commissioner's report, that the efforts were made to show subsequent putting of lock by the defendant. Then, it was contended that since the document is insufficiently stamped, and is unregistered, it is not even admissible in evidence, and therefore, no prima facie case could be found.

On the other hand, learned counsel for the respondent contended, that from a look at the report of the commissioner dt. 3.5.2007, it is clear, that the petitioner's lock was found on the shop, and the defendant has also put additional lock, but then, if the possession was not delivered, there was no occasion, for the plaintiff's lock being there. Then, learned counsel submitted that a look at the photographs produced along with the injunction application, by themselves, do clearly show, that the shop was functional, and was in possession of the plaintiff. It was contended, that one of the photos clearly establishes the existence of the glass door, and Plaster of Paris work done on the roof. It was also

contended, that the learned trial court has considered all the aspects, and has found that prima facie it is clearly established, from the documents produced by the plaintiff on record, so also from the commissioner's report, that after receiving possession of the shop, the plaintiff got erected the artificial roof of Plaster of Paris, got the walls painted, obtained R.S.T. & C.S.T. Numbers, way back in 2004 itself, and then gave orders to Bombay firms for supply, and purchased ready-made garments in wholesale, for business, for which bills have been produced, and that in the shop, one T.V., and one A.C. is also installed. Thus, the business was clearly functional, and it was on 10.4.2007, when the defendant raised obstruction, immediately F.I.R. was lodged against the defendant, and that, from the Commissioner's report dt. 3.5.2007 (sic 7.5.2007) it is clear, that the furniture, and ready-made garments were found, and there was seepage in the Plaster of Paris roof, and from the Commissioner's report dt. 10.5.2007, it is clear, that central lock was put, on account of which the locks could not be opened. It was also contended, that from the report of the Commissioner dt. 21.5.2007(sic 19.5.2007) it is clear, that the shop was inspected after opening the central lock, and it was found, that glass door is fitted, Plaster of Paris roof is there. Learned counsel invited my attention to photographs taken on 21.5.2007, which have been produced along with Commissioner's report, to contend, that from a look at them

it is clear, that the premises is a functional shop, and it is nowhere the case of the defendant, that all these merchandise and goods belong to him, or have been put by him. In that view of the matter, the impugned order does not require any interference. The learned counsel then submitted, that on 7.5.2007, interim stay was granted, restraining the defendant from creating any obstruction in plaintiff's carrying on business, and not to cause any damage in the shop, nor to raise any construction outside the shop, notwithstanding that, the defendant even did not allow the Commissioner to prepare the report, and the learned trial court has duly noticed the conduct of the defendant from time to time, to show, as to how he sequentially put lock, but then there is nothing to show, that the defendant was ever in possession. Thus, the impugned order does not require any interference.

Learned counsel for the appellant in rejoinder reiterated the submissions, and contended, that the learned trial court proceeded much on the basis of the commissioner's report, while it is established law, that commissioner cannot be appointed to collect evidence, and matter cannot be decided on the basis of such evidence, and therefore, the impugned order is liable to be set aside, and learned counsel in this regard relied upon the judgment of this Court in Union of India Vs. M/s. Kripal Industries, Raisinghnagar, reported in 1998(2) WLC-396. It was

contended, that the plaintiff has no where even contended, that the defendant had put his lock on the premises.

I have considered the submissions, and have perused the record of the learned trial court, of the miscellaneous proceedings, as has been requisitioned and received.

A look at the record shows, that the temporary injunction application was filed on 12.4.2007, alleging interalia, that the defendant is somehow out and out to dispossess the plaintiff, and therefore, on 10.4.2007 he damaged the pipe going through the roof, which resulted in percolation of water in the shop, electricity supply, hitherto continuing, has been discontinued, and on one side of the railing brick wall has been constructed, and on the other side, towards the staircase, 3-4 musclemen have been deputed, and has threatened to vacate the shop within 2-3 days. In reply to this application, which reply was filed on 1.5.2007. It is contended, that the defendant is the sole owner of Kirti Plaza Complex, and is in possession, in the basement and ground floor shops have been constructed, while on the first floor and second floor, hotel has been constructed by the defendant, and therefore, is entitled to use his property according to his free will. Then, the object of construction of the staircases in the premises has been pleaded. It was pleaded, that the plaintiff is not

the owner, nor in possession of the suit property (shop), as he has no legal right, title, or interest in the shop. It was also pleaded that "प्रार्थी एक अजनबी व्यक्ति होकर अतिक्रमी है". The allegation of threatening was denied, and it was pleaded, that unregistered and unstamped document does not give any right, and the defendant being trespasser, is not entitled to any injunction.

Before proceeding further, I may observe at this stage itself, that in the reply, it has not been pleaded that the wall has been constructed four years ago, or that, the plaintiff did not get constructed the Plaster of Paris roof, or that the electricity supply was not there, or that it has not been disconnected, or that the plaintiff is not carrying on business in the premises, rather in that regard it has been pleaded, that by mere production of R.S.T. and C.S.T. Certificate, and bills, it cannot be concluded that the plaintiff is in possession of the shop. Thus, these averments of the plaintiff can very safely be concluded to have gone un-controverted. With this, it is significant to note, that the defendant has pleaded the plaintiff to be stranger, and trespasser (अतिक्रमी), and this has been pleaded in continuation of the previous sentences, about the plaintiff having no legal right, title, or interest, in the suit property, and obviously, because the document is unregistered and unstamped, and is only agreement.

In my view, all said and done, pleading the plaintiff to be “trespasser”, does clearly indicate, that even according to the defendant, the plaintiff is in possession of the suit shop, which possession, according to the defendant, is not lawful, and is trespasser. In that view of the matter, much of the controversy raised, about delivery, or non delivery, of possession to the plaintiff, loses its significance, inasmuch as while pleading the plaintiff to be trespasser, it has not been pleaded by the defendant, as to when this trespass was committed by the plaintiff, and what action has been taken by the defendant against the plaintiff, for the said trespass. Obviously, the civil matters are to be decided on the basis of preponderance of probabilities, and do not require strict proof of the fact, as required in criminal case.

In view of the above pleadings of the parties, when the plaintiff has come with a case, that he is carrying on business in the suit premises in the name and style of “Abhishek Fashion Point”, and this fact is also not denied by the defendant, by pleading, that the plaintiff is not carrying on business, in this name and style, in the suit shop. On the other hand by contending the plaintiff to be trespasser, having no right title or interest in the suit property, even excluding commissioner's reports, submitted from time to time, for the purpose of ascertaining the fact of the plaintiff's

possession on the said premises, and is carrying on business in the suit premises as on the date of the filing of the application, in my view, even from the pleadings, it is quite clear, and is therefore reasonable to conclude, that the plaintiff is in possession of the suit premises, as on the date of the filing of the temporary injunction application, and is carrying on business, in the name and style of “Abhishek Fashion Point”.

For the present purposes even the F.I.R. lodged by the plaintiff on 10.4.2007 itself before the S.H.O., Kotwali, Chottorgarh can also be read, which lends corroboration to the plaintiff's version. Likewise, the photographs originally produced by the plaintiff, along with temporary injunction application, do also corroborate the plaintiff's version, as in the first photo there is a signboard of “Abhishek Fashion Point”, and there is glass door fitted, the second photo shows Plaster of Paris roof damaged by seepage of water, and the third photo shows open glass door of the shop.

Then, so far as the contention about injunction having been granted beyond the prayer made in the temporary injunction application is concerned, I find on record an application, filed on behalf of the plaintiff in this very proceedings, at page A-29/1, being an application under Section 151 C.P.C., filed on 28.5.2007, pleading that on

17.5.2007 interim stay was granted, details whereof were given, then commissioner's report and the photographer's sequence of events was catalogued, and it was prayed, that the central lock put by the defendant be ordered to be removed through police assistance, and appropriate order be passed for plaintiff's carrying on business fearlessly. This application is supported by the affidavit of the plaintiff. Then, at page A-30/1 I find reply, having been filed to this application by the appellant. It is contended therein, that interim stay was granted on 17.5.2007 after receiving the commissioner's report dt. 3.5.2007, which reported, that on the shop the locks of plaintiff, and defendant were found, both were opened, and shop was inspected. Then, it was pleaded that eight photographs were taken, but as photographer got disturbed he took out the roll, and photographs could not be printed. Then, it is pleaded that in the agreement dt. 14.9.2004 there is no mention about delivery of possession, and defendant has denied having delivered possession, and that inter lock could not be put unless the shutter was opened, and thus this central lock has not been installed anew, it was pleaded, that the shutters of the shops have ground locks, keys whereof are with the defendant, and since in the Commissioner's report dt. 3.5.2007 it is not mentioned that the defendant's lock was on the lock of the plaintiff. This also shows, that central lock is there, and that, it was with the consent of the advocates for either parties, to

cooperate with the commissioner, the locks were opened, and photographs were allowed to be taken, and that, the lock is existing since before filing of the suit. It is this time, it is pleaded, that the plaintiff is not carrying on any business in the shop, and it is wrong, that he is carrying on any ready-made garment business. Interalia with this, it was prayed, that the application be dismissed. Thus, the parties were alive to the controversy, that the plaintiff is requesting for removal of central lock, with police assistance, which prayer was opposed by the defendant appellant. In such circumstances, if the learned trial court has issued this mandatory injunction, it cannot be said to be beyond the prayer for temporary injunction.

So far as admissibility of document is concerned, in my view, when even according to the defendant, the plaintiff did not pay the balance sale price, and that the plaintiff had torn away original agreement, this much is clear, that there was agreement, between the parties, and for specific performance thereof, the suit has been filed. Since even according to the appellant, it is not recited in the agreement, that the possession was delivered at that time, obviously the requirement of registration cannot be said to be attracted. So far document being insufficiently stamped is concerned, that can always be recovered along with penalty, in accordance with the provisions of Stamp Act, but then, for the purpose of deciding temporary

injunction application, it cannot be said, that such a document cannot be considered.

Thus, considering from any stand point, I do not find any sufficient ground to interfere with the impugned order.

The appeal thus has no force, and is dismissed summarily. Record of the learned trial court be returned forthwith. In view of the nature of controversy involved, at the request of the learned counsel for the parties, the learned trial court is directed to decide the suit most expeditiously, and both the learned counsel assured, that they will extend their full cooperation to the learned trial court, in expeditious disposal of the suit.

(N P GUPTA),J.